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No. 91-511

In The

Supreme Court of the United States

October Term, 1991

DOW CHEMICAL, USA,

Petitioner,

v.

MR. & MRS. JESSE PINION,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF MR. & MRS. JESSE PINION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Dated: October 23, 1991

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QUESTION PRESENTED

Whether the Court of Appeals correctly dismissed Petitioner's appeal for lack of jurisdiction, holding that the failure of Petitioner's trial counsel to read the rules which prohibit extensions of time to file post trial motions was unreasonable and could not serve as a basis for invoking the unique circumstances exception to the mandatory and jurisdictional time limits for perfecting the filing of an appeal.

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Respondents Mr. and Mrs. Jesse Pinion respectfully request that this Court deny the Petition for a Writ of Certiorari, which seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit dismissing Petitioner's appeal for lack of jurisdiction.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Pinion v. Dow Chemical,*

U.S.A., 928 F.2d 1522 (11th Cir. 1991), and is set forth in Petitioner's Appendix at pages 1a-32a.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was issued on April 19, 1991. Rehearing and suggestion for rehearing en banc was denied on June 27, 1991. Petitioner purports to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On January 29, 1990, a jury verdict was returned in favor of Respondents, Mr. and Mrs. Jesse Pinion, in the amount of Two Million Four Hundred Fifty Thousand Dollars as a consequence of Petitioner's contamination of the groundwater beneath the Pinion farm near Dalton, Georgia.[1] At trial Petitioner admitted the contamination emanated from its latex manufacturing facility which adjoins Respondents' property.

Following the dismissal of the trial jury, trial counsel for Petitioner requested an extension of thirty days within which to file motions for judgment notwithstanding the verdict ("JNOV") and a new trial. Counsel for Respondents offered no objection, and two days later the

[1] The jury verdict consisted of Four Hundred Fifty Thousand Dollars in compensatory damages, and Two Million Dollars in punitive damages.

district court entered a consent order granting the requested extension. On February 23, 1990, a second consent order was entered, at the request of counsel for Petitioner, further extending the filing deadline to March 10, 1990.[2] Petitioner filed a motion for JNOV, or alternatively for a new trial, on March 8, 1990. The motion was denied on May 5, 1990. Petitioner filed its notice of appeal on May 25, 1990.

In a memorandum dated June 26, 1990, the Eleventh Circuit *sua sponte* questioned its jurisdiction over the appeal, and requested that the parties address the jurisdictional issue in their briefs on the merits. Oral argument was heard in this matter on January 30, 1991. On April 19, 1991, the Eleventh Circuit dismissed the appeal. *Pinion v. Dow Chemical, U.S.A.*, 928 F.2d 1522 (11th Cir. 1991). The Court denied rehearing and suggestion for rehearing en banc on June 27, 1991.

SUMMARY OF THE ARGUMENT

The record in this case presents an obvious, although inadvertent, failure by Petitioner's trial counsel to adequately familiarize themselves, and comply, with certain mandatory and jurisdictional requirements of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. This failure occasioned their request of the district court to extend the time within which to file post-trial motions, as well as their subsequent reliance

[2] The consent orders appear in Petitioner's Appendix at 35a-36a.

upon that extension to toll the time within which to file a notice of appeal. Those actions were unreasonable, and do not constitute a sufficient basis for application of the narrow "unique circumstances" doctrine as announced in *Wolfsohn v. Hankin*, 376 U.S. 203 (1964).

The Court of Appeals correctly interpreted that equitable doctrine, and declined jurisdiction over the appeal. Summary reversal is not warranted.

There is no substantial conflict among the circuits concerning the unique circumstances doctrine, and plenary review is not warranted here as the correct result was reached below.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *WOLFSOHN V. HANKIN*

The Petition for Writ of Certiorari asserts that the decision of the Eleventh Circuit "directly conflicts" with this Court's decision in *Wolfsohn v. Hankin, supra*. To the contrary, the decision below specifically acknowledges the so-called "unique circumstances" rule, and reaffirms the obligation of that court to apply Supreme Court precedent. *See* 928 F.2d at 1530. What Petitioner apparently fails to comprehend is that recognition of an equitable doctrine does not impose a requirement that it be applied in all circumstances.

The unique circumstances exception to the mandatory and jurisdictional filing requirements of the Federal

Rules of Civil Procedure emerged from a trilogy of cases in the early 1960's. *See Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam); *Thompson v. I.N.S.*, 375 U.S. 384 (1964) (per curiam); *Wolfsohn v. Hankin, supra.* In the years following the aforesaid decisions, no case decided by this Court has followed that precedent.

To the contrary, in the intervening period this Court has rigorously imposed a restrictive view of the power of a district court to expand the period of time within which a litigant must perform a mandatory jurisdictional act. *See Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam); *United States v. Locke*, 471 U.S. 84 (1985). Indeed, four members of this Court have specifically stated that "Our later cases . . . effectively repudiate the *Harris Truck Line* approach, affirming that the timely filing of a notice of appeal is 'mandatory and jurisdictional.' " *Houston v. Lack*, 487 U.S. 266, 282 (1988) (Scalia, J., dissenting joined by Rehnquist, C. J., O'Conner, J., and Kennedy, J.) (quoting *Griggs*, 459 U.S. at 58).[3]

A careful review of the circumstances attending *Wolfsohn*, the decision of this Court which Petitioner asserts to be "most similar" to the instant factual situation, offers subtle but significant distinctions which render the cases quite distinguishable. As recited in the Statement of the Case contained in the Petition for a Writ of Certiorari to

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[3] The majority in *Houston v. Lack, supra*, did not address the "unique circumstance" exception.

the United States Court of Appeals for the District of Columbia Circuit filed in this Court on December 17, 1963, the petitioner in *Wolfsohn* filed a motion to extend the time either to move to vacate or ask for rehearing some four days after the entry of summary judgment against her. Her counsel was hospitalized at the time, recovering from an illness involving surgery.[4] The extension prayed for was granted, and the petitioner subsequently filed her Rule 59 motion within the expanded time period set by the district court. In its brief per curiam decision, this Court reversed the decision of the D. C. Circuit to dismiss the appeal for lack of jurisdiction.[5]

Petitioner here can offer no such compelling circumstances to warrant application of an equitable doctrine. There was no illness or hospitalization of counsel, only the stark admission by Petitioner that its trial counsel "inadvertently overlooked the Rule 6(b) prohibition." *See* 928 F.2d at 1524, n.2.

Stated simply, counsel for Petitioner did not know, misread, or ignored the applicable rules regarding the filing of its notice of appeal. Such an unawareness or misreading of the time computation principals by counsel

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[4] *See* Petition for Writ of Certiorari, at 4-5, 10, *Wolfsohn v. Hankin, supra* (October Term, 1963, Case No. 680).

[5] Justice Clark, joined by Justices Harlan, Stewart and White, vigorously dissented to the majority's reversal, noting that the trio of "unique circumstances" cases was subverting unambiguous mandates of the Congress in imposing specific filing deadlines. *Wolfsohn, supra,* 376 U.S. at 203.

has never been the basis upon which to apply the unique circumstances doctrine,[6] and properly should not be so here. Filing deadlines, if they are to have content, must be rigorously enforced. *United States v. Locke, supra* at 100-101.

II. THERE IS NO SUBSTANTIAL CONFLICT IN THE CIRCUITS REGARDING THE SCOPE OF THE UNIQUE CIRCUMSTANCES DOCTRINE.

Much as this Court has tended to strictly construe procedural rules and filing requirements, the various circuit courts have narrowly interpreted and sparingly applied the unique circumstances exception. While there are, no doubt, varying verbal formulations defining the availability of the exception, there is not sufficient conflict among the circuits to warrant the grant of certiorari and the Court's attention here. Each of the circuit courts considering application of this equitable doctrine has accepted its continuing vitality, and has evaluated all attendant relevant circumstances in determining whether exercise of the exception was warranted.

Petitioner seeks to establish conflict among the circuits by pointing to various decisions, contending that the Third, Seventh, Ninth and Eleventh Circuits[7] apply a differing, more rigorous standard for "triggering" the

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[6] *See Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1365-66 (3rd Cir. 1990).

[7] *See, e.g., Kraus v. Consolidated Rail Corp., supra; Green v. Bisby*, 869 F.2d 1070 (7th Cir. 1989); *In re Slimick*, 928 F.2d 304 (9th Cir. 1990); *Pinion v. Dow Chemical, U.S.A., supra.*

exception than that of the Fifth and D.C. Circuits. To the contrary, each circuit court decision cited in the Petition for Certiorari evidences careful review of the exception, the scope thereof, and application to the particular factual situation attending the case.

The attempt to contrast *Fairley v. Jones*, 824 F.2d 440 (5th Cir. 1987) fails upon careful examination. *Fairley*, cited by Petitioner as a decision "still adher(ing) to the doctrine as originally spelled out in *Harris Truck*, *Thompson* and *Wolfsohn*," is not only readily distinguishable on its facts, but evidences a remarkable underlying similarity of reasoning to that of the Eleventh Circuit below. *Fairley* involved a *pro se* litigant, a situation quite contrary to that of Petitioner. Clearly, equitable considerations would favor a more lenient formulation of the doctrine in the absence of counsel.

Yet even more significant, the Fifth Circuit imposes precisely the same criteria for justifying application of the unique circumstances exception as that utilized by the Eleventh Circuit below: A consideration of the reasonableness of the reliance on the District Court's action. *Fairley*, at 442-443; *Pinion*, at 1532-1534.

Aviation Enterprises, Inc. v. Orr, 716 F.2d 1403 (D.C.Cir. 1983) likewise fails to evidence a genuine conflict among the Circuits. There, the D.C. Circuit considered circumstances where the district court vacated a prior order and simultaneously issued a superseding order, from which a new 60-day period for filing a notice of appeal ostensibly commenced to run. The notice of appeal was properly filed within the new 60-day period, but outside the 60-day period that would have run from the initial order.

Although the court specifically left undecided which 60-day period was operative, *dicta* contained in a footnote to the decision states that the delay would not "have been fatal" in any event due to the unique circumstances exception. *Aviation Enterprises, Inc. v. Orr*, at 1406, n. 25.

Neither decision can hardly provide a sufficient basis for Petitioner to boldly allege that "Dow's appeal would undoubtedly have been deemed timely under the Fifth and D.C. Circuits' rules . . . " Such a speculative statement does not fairly frame the factual situation attendant here, nor the circuit court cases considering the unique circumstances exception.

The decision below is a correct one, thoughtfully considering the scope of the unique circumstances exception. As interpreted by the Eleventh Circuit, the exception is available only upon a showing of *reasonable reliance* upon the action of the district court. Careful review of the decisions of the various circuits evidences the commonality of that requirement, not a conflict as suggested by Petitioner. This case does not present circumstances where one circuit court of appeals has rendered a decision in conflict with another, and certiorari should be denied.

III. THERE IS NO NEED FOR PLENARY REVIEW OF THE UNIQUE CIRCUMSTANCES EXCEPTION

As is summarized above, the circuit courts continue to recognize the existence of the unique circumstances doctrine, while narrowly applying the exception in light of several recent decisions of this Court reiterating the "harsh" consequences for litigants who fail to comply

with jurisdictional prerequisites mandated by the legislature. Plenary review of the decision below is not needed, and it would not seem an appropriate use of scant judicial resources to accept certiorari in a matter which has been correctly decided.

The continuing vitality of the doctrine has indeed been questioned both at the circuit level and by members of this Court.[8] There has not been, however, a *"de facto* overruling" as suggested by Petitioner, nor is there need to "reconcile" Justice Scalia's dissent in *Houston* with the writing of Justice Kennedy in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). Quite to the contrary of that stated in the Petition for Certiorari, there was no "reliance on the 'unique circumstances' doctrine in *Osterneck*." (Petition for Certiorari, page 11). This Court unanimously and unequivocally concluded the decision of the Eleventh Circuit was correct, and that the petitioners in that case were not entitled to have the appeal heard on the basis of unique circumstances. *Osterneck*, 489 U.S. at 178. It is, simply, incorrect to suggest that this Court relied on the exception in that decision.

The lower courts are constrained to apply the doctrine until retracted by this Court. This case, correctly decided below, is not the appropriate vehicle for such retraction.

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[8] *Houston v. Lack, supra.*

CONCLUSION

The decision of the United States Court of Appeals for the Eleventh Circuit is imminently correct and presents none of the special and important considerations favoring review by this court on certiorari.

The unique circumstances doctrine, founded in equity, does not exist to rehabilitate attorney oversight or inadvertence. Petitioner here unreasonably relied to its detriment that the district court order granting it additional time within which to file post-trial motions in the district court would further operate to toll the time for filing its notice of appeal. It received no specific judicial assurance of that fact, and failed to examine the applicable rule to observe the inherent inconsistency between the text of the rule and the court's order. The Petition for Certiorari offers no compelling reasons to disturb the judgment of the Court of Appeals.

For these reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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